COMMISSIONERS OF THE MUNICIPALITY OF MALACCA v. SINNIAH

[O.C.J. (Sharma J.) December 8, 1973]
[Malacca — Civil Suit No. 159 of 1970]

Landlord and Tenant — Employee occupying quarters allotted to him by reason of his employment — Retirement from service — Employee remaining in occupation — Whether licensee or tenant — Control of Rent Act, 1966, ss. 4(2), 16(1)(g).

Evidence — Evidence of age — Age recorded in Record of Service — Presumption — Estoppel.

The defendant was an employee of the plaintiff and had been allotted quarters by reason of his employment with the plaintiff. When he joined the service, his particulars were entered on the Record of Service and in accordance with the age given therein he was retired from service when he attained the age of fifty-five in 1968. The defendant questioned the veracity of that entry. He did not vacate the quarters when required to do so and proceedings were instituted for possession.

Held: (1) the defendant had not discharged the onus of showing that the entries in the Record of Service were incorrect;

(2) the defendant was estopped from denying that he was twenty-five years of age at the time of his employment as stated in the Record of Service;

(3) the defendant was a licensee and could not resist the plaintiff's claim on the ground that he had a right under the contract of service to remain in the quarters;

(4) even if he was a tenant the case fell squarely under section 16(1)(g) of the Control of Rent Act 1966 and the plaintiff was entitled to recover possession against the defendant.

Cases referred to:-

(1) *Torbett* v. *Faulkner* [1952] 2 T.L.R. 659, 660.

(2) *National Steam Car Company Limited* v. *Barham* (1920) 122 L.T. 315.

(3) *Ramsbottom* v. *Snelson* [1948] 1 K.B. 473.

(4) *Anglo-Oriental Plantations Ltd.* v. *D'Cruz* [1967] 1 M.L.J. 83.

(5) *Bennings (Mitchum) Ltd.* v. *Bijastra* [1945] 2 All E.R. 433; (1946) KB. 58.

(6) *Munro* v. *Daw* [1948] 1 K.B. 125.

(7) *Braithwaite & Company Ltd.* v. *Elliot* [1947] K.B. 177.

(8) *Wilson* v. *Croft* [1971] 1 K.B. 241, 247.

CIVIL SUIT.

S. C. Navarednam for the plaintiff.
Gurdial Bakan Singh for the defendant.

Sharma J. (delivering oral judgment): The plaintiff is the Commissioner of the Municipality of the Town and Fort of Malacca. The Municipality are the owners of premises known as Quarters No. 116 Jalan Bukit China, Malacca (hereinafter referred to as the quarters).

The defendant was an employee of the plaintiff and the said quarters were allotted to him by reason of his employment with the Municipality. This is admitted in paragraph 1 of the defence. The defendant joined service with the Municipality on 1 July 1938. According to the record of his service (Exhibit P7) he was twenty five years of age at that time. He had come from India with his father and brother (DW5). He did not have with him any certificate of birth at that time. The defendant questions the veracity of the entry made in P7 showing his age as twenty five in 1938. It is, however, not conceivable how such an entry could have been made unless the defendant himself represented to his employer at the time of his employment that he was twenty five. He could serve the Municipality up to the age of fifty five. If he was twenty five in 1938, he must have been born in 1913 which meant that he could remain in the employment of the Municipality up to 1968.

On 30 December, 1967 the Secretary to the Municipality served on the defendant a notice informing him that as he would be attaining fifty five in 1968 his services would come to an end on 1 January 1969 (see Exhibit A8) and that he was consequently required to vacate the quarters occupied by him as an employee of the Municipality. The quarters as already stated had been allotted to him as such employee. They were given to the defendant free of any rent. In reply to A8, the defendant took the stand that he was forty eight years of age and alleged that he was born only in 1922. He relied on the age as given in his identity card D1, in his passport D3 and in his Vaccination Certificate D2. Certain correspondence ensued between the parties and their respective solicitors thereafter and this is contained in A10 to A34. In one of such letters A18, the defendant admitted and acknowledged the fact that he had *retired* from service as from 1 January 1969 and that as he was unable to find any alternative accommodation he should be *permitted* to stay in the quarters until April 1969 and that he would in that month vacate the said quarters. This letter is dated 13 February 1969 and was no more than a plea to the plaintiff to allow him to overstay on the grounds of pity and sympathy. The plaintiff in the letter A19 dated 26 February 1969 granted *permission* to the defendant to "continue to occupy the quarters up to 31 March 1969" provided that he paid a sum of $20 per month as from 1 January 1969 as "rental" of the quarters. This letter also notified the defendant that if he failed to quit on 31 March 1969 an action would be filed for his ejectment. On the 30 April 1969 the defendant by his letter A30 wrote to the plaintiff that "inspite of making diligent searches and enquiries" he had been unable to find alternative accommodation. He again begged the plaintiff for his "kind permission" to "allow" him and his family to remain in occupation of the quarters until 31 May 1969.

The plaintiff filed this action on 2 September 1970 claiming possession of the quarters, damages for unlawful occupation thereof and costs. The only plea taken up in the defence was that as the defendant was born in 1922, he could not be evicted, that his retirement was wrongful, that he was entitled to remain in occupation of the quarters until he reaches the age of fifty five and that he could not be asked to pay a rental of $20 per month or any sum whatsoever as from 1 January 1969.

The following agreed issues were framed on 30 December 1970:

1. Did the defendant continue to remain a tenant of the plaintiff after 31 March 1969?
2. If he was such a tenant, what were his rights, if any, to remain in occupation of the premises after 31 March 1969?
3. Was the defendant a licensee of the plaintiff from 1 January 1969 to 31 March 1969?

An additional issue was framed by the court on the application of the counsel for the defendant and this issue was as follows: —

4. Had the defendant any right to remain in occupation of the premises up to the age of 55 irrespective of whether he was dismissed from service or not?

It was also agreed that the onus of proving issues Nos. 1, 2 and 4 was on the defendant and that as regards issue No. 3 the onus was on the plaintiff.

At the very outset I may hasten to say that the defendant has not impressed me at all as a witness who could have any serious regard for telling the truth. He himself did not know his age even when he started giving evidence in court. I do not regard him as trustworthy at all. He had a horoscope which was lost during the Japanese occupation. He was, according to part of his testimony, thirty five at that time. According to another part of his evidence he got married at the age of thirty six and his eldest child was nineteen. That, of course, would make his age as fifty five in 1971 but this child could not possibly be nineteen in 1971 as she was said to have been born in 1940. In P6 he represented that he was only forty eight. In A13 which was written eleven months later he became forty six. According to him his father died in 1931 when he, *i.e.* the defendant, was sixteen. This would give his year of birth as 1915 and not 1922. He got married in 1940 at the age of twenty five but maintained that he was only sixteen in 1938. He had sufficient time to obtain a certified copy of the entry relating to his birth from the relevant authorities in India. If the date was so important to him in this case, as it certainly was, he could have applied for Letters of Request to be issued to the Indian courts or could have got a commission appointed. He did nothing of the sort. The keynote of his evidence is that if there is or was any document which could be relied upon or which could throw some light on the date of his birth, it was either lost or destroyed. His father was supposed to have kept a note of his date of birth in a note book. The defendant's elder brother (DW5) who should have known better — not that I believe him — said that there was no note book but only a note written on a piece of paper kept in a box. In 1930, this piece of paper was already old and yellow in colour. The defendant's father returned to India in 1930 and died there a year or so afterwards. If DW5 was born in 1919, he would only be about eleven at the time his father left this country. It is extremely unlikely that the defendant's father told DW5 that he could refer to that piece of paper if at any time the date of birth of the defendant or DW5 had to be disclosed to anyone. I am somewhat fortified in this view that there was no such paper because both the defendant and DW5 joined service with the Municipality after their father's return to India in 1930 and in both P7 and P14 their ages are given as twenty five and twenty years respectively. Thus according to P7 the defendant was twenty five in 1938 and DW5 twenty years of age in 1933.

The Municipality employed them at different times and had no means to know and had no concern to ascertain whether they were real brothers. I am satisfied that both of them were asked what their ages were and it was only as a result of their own representation made to the Municipality that their respective ages were inserted in P7 and P14. It was in 1933 that DW5 had to break open the lock of the box in which this alleged piece of paper was supposed to be and yet in that very year when he obtained employment he gave his age as twenty years to the Municipality whereas he now maintains that he was only fourteen at that time. It should not have been difficult for a reasonably intelligent or observant officer of the Municipality to see whether DW5 was twenty or only in the adolescent period of his life and of fourteen years of age. Again according to DW5 the defendant did not know anything about what was contained in the box and the relations between the two brothers were never good.

As far as the age of the defendant is concerned his main reliance can only be on the date or the year of birth inserted in his identity card. Identity cards were, according to DW6, first introduced in this country only in the year 1948. The defendant was obliged to obtain an identity card. The application for grant of an identity card to him was submitted by him together with his statutory declaration as he had no certificate of birth and it was on the basis of his application and statutory declaration alone that the identity card No. M118385 was first issued to him. That application and statutory declaration have, in accordance with departmental procedure, been destroyed. The new identity card D1 merely reproduces the year of birth which was inserted in the first identity card issued to the defendant. Exhibits D2 and D3 were issued in 1967 and they of necessity had to show that insertion of the age of the defendant which was given in his identity card D1. These documents are no proof of his real age. If an identity card was issued to the defendant on the strength of a statutory declaration which was not true and of which the plaintiff had no knowledge and to which the plaintiff was not a party, that identity card alone cannot be the proof of the defendant's real age unless it is established that the age given in the identity card is true. The year of birth given in the identity card was based on a statement which the defendant had himself made to an authority different from the plaintiff, his employer. It was a unilateral statement in no way binding on the plaintiff. The defendant has further at no stage taken any steps to have his age corrected or rectified in his Record of Service and this has to be construed against him.

I am not prepared to rely on the evidence of the defendant, DW4 or DW5 in so far as the age of the defendant is concerned. They are all interested witnesses and in my estimation unreliable.

The evidence of DW2, Dr. Narinder Singh is also not very helpful to the defendant. Exhibit D4 is the report of Dr. Narinder Singh and it is nothing more than his opinion. It reads:

"It is impossible to ascertain accurately radiologically the age of a physically mature adult, but the appearance in the chest and lumber spine suggest an approximate age of about 50 years (fifty), give or take a few years."

In cross examination DW2 stated that the margin of error can also not be definitely put at five years.

It may be slightly more or slightly less and that a good deal depended upon the nutrition and habits of a person.

In answer to questions put by me the defendant himself stated:

"I have been looking after my health and taking good food ever since I came to this country. I never had any serious sickness or trouble nor did I ever meet with any accident. I have been keeping good habits except for keeping a mistress. I cannot say if I look younger or older than my age."

The doctor's estimate about a person's age is not proof but merely an opinion. Medical opinion as to age cannot override the fact of other cogent evidence on the point. His opinion as to age judged by appearance, voice, union of epiphyses is worthless. It cannot stand against entries in the Register of Births. If an entry is made in the Register of Births it is that entry which has to be relied upon more in proof of a person's date of birth than the mere opinion of a doctor unless it be proved that the entry itself was false. I am not saying that the evidence of a doctor as to age is without any value. All I wish to stress is that by itself it is not sufficient to fix the exact age and at any rate in this case taking into account the margin of error that there could exist between the age of the defendant as estimated by DW2 and his actual age, taking into account the good health and habits of the defendant and the good food that he had been always used to, it is, in my view, more likely that he had already attained the age of fifty five when he was examined by DW2.

A good deal was relied upon by the learned counsel for the defendant on cases decided under section 32 of the Evidence Act. Reliance was first placed on section 32(f) but it was then conceded that section 32(f) had no application and what as applicable was section 32(e). I do not consider it necessary to go into the application of section 32(e) in relation to the proof of the age of the defendant on the basis of a writing left by the defendant's father as I have already held that no such writing existed.

P7 is the Record of Service of the defendant himself. It was prepared in the year 1938.

Section 90 of the Evidence Act provides:

"90. Where any document purporting or proved to be twenty years old is produced from any custody which the court in the particular case considers proper, the court may presume that the *signature and every other part of that document* which purports to be in the handwriting of any particular person is in that person's handwriting...."

Private or public documents twenty years old produced from proper custody and otherwise free from suspicion prove themselves and no evidence of the handwriting, signature, sealing or delivery need in general be given. If a document twenty years old or more is produced from proper custody and is on its face free from suspicion the court may presume —

(1) that it has been signed or written by the person whose signature appears or in whose handwriting it purports to be; and

(2) that it has been fully attested and executed if it purports to be so.

The presumption relates to the execution of the documents, *i.e.* signature, attestation, etc. In other words, to its genuineness but not to the truth of its contents. The person presenting a document under section 90 is relieved of the necessity of proving that it was executed by the person who is purported to be the executant but the court will not *presume the correctness* of any statement in the document. Exhibit P7 has been produced from proper custody and, in my view, is altogether free from any suspicion.

After the defendant had been issued with an identity card the number of that identity card was inserted in P7. An argument was sought to be built by the learned counsel for the defendant that any officer of the Municipality who inserted the number of the identity card could at that stage have verified the exact age or date of birth of the defendant and that the defendant's year of birth could easily have then been checked. I do not see much merit in that argument. The defendant had already made a representation about his age to his employer at the time of his employment. If identity cards in this country were issued after the defendant had been employed by the plaintiff for some years the number of the identity card entered in P7 or the age of the defendant given in the identity card did not alter the representation of the defendant made to the plaintiff. The identity card identified the man and not his age unless the age given in the identity card was based upon the primary evidence of a birth certificate. There was no such primary evidence in this case. The Municipality was not obliged under any law to re-verify or re-check the ages of its employees on the introduction of identity cards in this country.

It has been said that in the case of documents more than twenty years old the genuineness of which is disputed it is necessary for the courts to consider evidence, external and internal, of the document in order to enable them to decide whether in particular cases they should or should not presume proper signature and execution. If the circumstances are such which throw grave doubts as to the genuineness of the documents the courts will refuse to draw any presumption. In this case I do not find any circumstance or evidence which can throw P7 into the field of doubt about its genuineness. I am satisfied that the age given therein was inserted as given by the defendant himself. There was no suggestion either in the pleadings or in the evidence that this document (P7) was a fraudulent document. Fraud was neither alleged nor proved. The genuineness of P7 was again attacked on the ground that the signatures of the defendant which appeared on it were different from the signatures appearing in some other documents produced in this case. In Exhibit D2, which is the vaccination certificate of the defendant, his signatures look altogether different on two different pages of the same book although he signed them on the same day. The onus, in any case, was on the defendant and he has failed to discharge that onus.

Apart from the presumption under section 90 there is the presumption under section 114 illustration (e). Acts of officers of the Municipality are presumed to have been regularly performed, *i.e.* correctly done. The Municipal officer concerned who appointed the defendant must have presumably been satisfied that the defendant was twenty five years of age in 1938. The

minimum age required for recruitment was eighteen. If the defendant was so eager to get employed so as to be prepared to lie about his real age he could easily have said that he was eighteen but why say twenty five if he was not twenty five?

Again the defendant is estopped from denying he was twenty five years at the time of his employment. He was employed on the faith induced by him that he was twenty five.

In *Halsbury's* Laws of England (Third Edition) volume 15, page 175, paragraph 344, the position is put in these words:

"344. When one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced.

This doctrine, which is derived from a principle of equity enunciated in 1877, has been the subject of considerable recent development. It differs from estoppel properly so called in that the presentation relied upon need not be one of present fact.

The doctrine may have been too widely stated in recent cases and its limits are not yet finally settled. The doctrine cannot create any new cause of action where none existed before, . . ."

A representation in order to attract the rule of estoppel need not always be a representation of a physical fact but may as well be a representation of an attitude or a state of mind. As has been observed the state of a man's mind is as much a matter of fact as a state of his digestion.

It was at the very outset of the submissions yesterday conceded by the learned counsel for the defendant that the Control of Rent Act 1966 had no application to the facts of this case by virtue of the provisions of section 4(2)(c) of that Act. Subsequently, however, he submitted that the quarters were rent controlled premises and that section 4(2)(c) of the Act did not apply. Section 4(2)(c) of the Control of Rent Act 1966 reads:

"4(2) The following premises shall be free from the operation of any of the provisions of this Act, namely —

(c) premises which are vested in or acquired by or on behalf of any Municipality for the purposes of the Municipal Ordinance of the Straits Settlements in force in the States of Malacca and Penang. . . ."

I may add that I am a little handicapped in deciding that point as no authorities have been produced by either side and both the learned counsel conceded that they were in a state of doubt as to whether the premises occupied by the defendant were in fact occupied by him for the purposes of the Municipal Ordinance. The Control of Rent Act could apply only if there was a "tenancy" or there was a relationship of landlord and tenant between the parties. The very definition of "premises" in the Act contemplates "a letting out" and the definition of "tenancy" given in the Act again contemplates the creation of a relationship of landlord and tenant between the parties. If there is a tenancy of certain premises granted by the Municipality and this tenancy is not related to or does not promote the purposes of the Municipal Ordinance such a tenancy would certainly, in my view, come within the mischief of the Control of Rent Act. If such a tenancy exists and the Control of Rent Act applies one has to read section 4(2)(c) in conjunction with section 16(1)(g) of the Act. Section 16(1)(g) of the Control of Rent Act 1966 provides as follows:

"16.(1) Except for an application made under sections 18 and 18A for the recovery of possession of any controlled premises or any part thereof for the purpose of effecting or causing to be effected thereon any development, all applications for the recovery of possession of such premises or any part thereof shall be made to a court; and no order or judgment for the recovery or possession of any controlled premises or any part thereof comprised in a tenancy shall be made or given by the court except in any of the following cases —

(g) where the controlled premises were let to the tenant by reason of his employment in the service of the landlord, and such employment has ceased."

If premises are let to a person by reason of his employment and even if he is to be treated as a tenant he is liable to be evicted on his ceasing to be in employment. It is a tenancy for a fixed period and the law does not give protection to such an employee beyond the period of his employment.

Where quarters are provided by a company to one of its employees and rent is not charged for the same the employee is liable to ejectment after the termination of his services.

Section 16(5) of the Control of Rent Act 1966 does require a notice to quit to be served except in cases falling under section 16(1)(e).

The plaintiff was obliged to serve on the defendant a notice to quit under the Act but only if the defendant was a tenant of the plaintiff. If a servant is given a personal privilege to stay in a house for the greater convenience of his work, and it is treated as part and parcel of his remuneration, then he is a licensee, even if the value of the house is quantified in money; but if he is given an interest in the land, separate and distinct from his contract of service, at a sum properly to be regarded as rent, then he is a tenant. (See *Torbett* v. *Faulkner*.[1]) Occupation of premises by servants as contemplated in section 16(1)(g) applies only to those premises where there is a proper letting out.

In *Torbett* v. *Faulkner*[1] Denning L.J. said:

"A service occupation is, in truth, only one form of licence. It is a particular kind of licence whereby a servant is required to live in the house in order the better to do his work. But it is now settled that there are other kinds of licence which a servant may have. A servant may in some circumstances be a licensee even though he is not required to live in the house, but is only permitted to do so because of its convenience for his work — see *Ford* v. *Langford* (1949) 65 T.L.R. 138. *per* Lord Justice Asquith and *Webb, Ltd.* v. *Webb* (unreported, October 24, 1951) — and even though he pays the rates. *Gorham Contractors, Ltd.* v. *Field* (unreported, March 26, 1952) and even though he has exclusive possession, *Cobb* v. *Lane* [1952] 1 T.L.R. 1037."

The Lord Justice then continued:

"If a servant is given a personal privilege to stay in a house for the greater convenience of his work, and it is treated as part and parcel of his remuneration, then he is a licensee, even though the value of the house is quantified in money; but if he is given an interest in the land, separate and distinct from his contract of service, at a sum properly to be regarded as a rent, then he is a tenant, and none the less a tenant

because he is also a servant. The distinction depends on the truth of the relationship and not on the label which the parties choose to put it: see *Facchini* v. *Bryson* [1952] 1 T.L.R. 1386."

The occupation of a servant ceases not only on the termination of his employment but also on his retirement or death. The employer is at liberty to allot any other quarters to his employee and ask him to shift to new quarters. All the terms of the agreement of service are to be looked at and gone into. If these terms of service are consistent with the express intention that the employee is permitted to occupy the premises as a licensee and there is nothing in the conditions of service which could be deemed to create a relationship of landlord and tenant there can be no room for the application of the provisions of the Control of Rent Act. The conditions of service on their true construction and taken in the light of the surrounding circumstances can alone determine whether what was conferred upon the employee was a licence or a tenancy. In the present case the conditions of service did not create in favour of the defendant any interest in the quarters apart from the privilege which was granted to him to occupy them. He had what may be called a personal privilege or licence to occupy the quarters either for the greater convenience of his work or as a facility attached to the terms of his service.

Under section 16(1)(g) of the Control of Rent Act 1966 if the premises are *let* to a tenant for use as a residence *in consequence of his being in service* of the landlord and such a tenant ceases to be in the service of the landlord, this itself constitutes a ground for his eviction. The clause refers to an occupation by a servant qua tenant, whether such occupation is by way of remuneration or a part payment of services or whether he pays rent or not. It is not necessary so far as this clause is concerned that his occupation should be ancilliary or subservient to the performance of his services.

In *National Steam Car Company Limited* v. *Barham*[2] the plaintiffs had employed the defendant to take charge of a garage and he was allowed to occupy residential premises which belonged to the plaintiffs. The defendant's services were terminated and he was able to secure some other employment. He, however, continued to remain in occupation of the premises and the plaintiffs had to bring ejectment proceedings against him. The defendant relied upon the Increase of Rent and Mortgage Interest (War Restrictions) Acts 1915-1919. A.T. Lawrence J. in delivering a very short judgment said:

"The Increase of Rent, &c. (War Restrictions) Acts do not apply to a case like this, where the occupier was a servant of the landlords and occupied the premises for the purposes of his employment with the landlords. There must be an order for possession."

In *Ramsbottom* v. *Snelson*,[3] a farm labourer was required to live in a particular house for the purpose of his employment. The house was rented by the employer but the employee occupied it rent free. On the termination of his employment he failed to vacate the premises. It was held that the employee was not a tenant but a licensee.

It should, however, be borne in mind that the provisions of section 16(1)(g) of our Control of Rent Act 1966 are in many material respects different from the provisions of Schedule 1(g) of the Rent and Mortgage Interest Restrictions (Amendment) Act 1933 which reads: —

"(1) Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 Geo.5, c.32) section 3, (1)(a): 'No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom shall be made or given unless the court considers it reasonable to make such an order or give such a judgmtnt, and ... (a) the court has power so to do under the provisions set out in the First Schedule to this Act.' Schedule 1. 'A court shall, for the purposes of section 3 of this Act, have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if ... (g) the dwelling-house is reasonably required by the landlord for occupation as a residence for some person engaged in his whole-time employment ... and ... (i) the tenant was in the employment of the landlord ... and the dwelling-house was let to him in consequence of that employment and he has ceased to be in that employment'."

The present case seems to be a much stronger case, if not on all fours, with the case of *Anglo-Oriental Plantations Ltd.* v. *D'Cruz*[4] although that was a case of dismissal. The defendant, in my view, was only a licensee in this case and cannot resist the Plaintiff's claim merely on the ground that he had a "right" (which was no more than a privilege) under the contract of service to remain in the quarters allotted to him by the plaintiff free of rent. The privilege could not be permanent. He cannot say that once he got into the quarters his employer had no right to ask him to vacate those quarters. Even if he was not a licensee but a tenant the case falls squarely under section 16(1)(g) of the Control of Rent Act 1966.

Reference may be made to the cases of *Benninga (Mitcham) Ltd.* v. *Bijstra*,[5] *Munro* v. *Daw*[6] and *Braithwaite & Company Limited* v. *Elliot*.[7] I do not propose to deal with them in detail. Our section 16(1)(g) of the Control of Rent Act 1966 covers a much wider field in favour of the employer landlord.

Section 16(6) of our Control of Rent Act 1966 provides as follows:

"(6) In any proceedings for the recovery of possession of any premises except on the grounds set out in paragraph (a) of subsection (1) no costs shall be awarded to either party to the proceedings:

Provided that if the court is of the opinion that either the landlord or the tenant has acted in an improper or unreasonable manner the court may order that the landlord or the tenant, as the case may be, shall pay the whole or part of such costs as it may think fit."

In the case of *Wilson* v. *Croft*[8] the question of costs was dealt with and Salmon L.J. in his judgment at page 247 said:

"I think the clear intention of the Act was for the court to look at the conduct of the owner and of the occupier and balance one against the other, and then to decide whether the owner had proved, on a balance of probabilities, that there were special reasons which made it just that the occupier should pay the costs or some part of them."

The defendant in this case continued to occupy the quarters without paying a cent and had taken the attitude that the privilege to occupy the quarters continued to remain with him even after the termination of his services. This was conduct which displayed an attitude of defiance.

The defendant having failed to discharge the onus cast on him and I having held that he was a licensee, there will be an order for his ejectment and an order that he pay to the plaintiff damages at the rate of $20 per month from 1 May 1969 as also the costs of this suit.

Regarding Civil Suit No. 216 of 1969 which is a suit in which the plaintiff alleges that he had been wrongfully dismissed from his employment and in which he seeks to recover the gratuity and provident fund to which he was entitled while in the service of the defendant, I have already held that he was retired from service on attaining the age of fifty five. No question of any unlawful dismissal consequently arises. No evidence in fact was led in that case by the plaintiff and it was agreed that the evidence produced in the earlier suit should be treated as evidence in this case. The defendant has always been ready and prepared to pay the gratuity and provident fund to the plaintiff provided that he vacated the quarters. No evidence was led to prove that the plaintiff in this suit had sustained any damage. His claim for damages in this suit is dismissed. The defendant will pay him whatever is due to him on account of gratuity and provident fund after deduction of the damages and costs which he as the plaintiff in the earlier suit is entitled to recover. There will be no order as to costs in this suit.

Order accordingly.

Solicitors: *Suleiman C. Navarednam & Co.; Gurdian Bakan Singh.*

ONG ENG CHAI v. CHINA INSURANCE CO. LTD.

[O.C.J. (Hashim Yeop A. Sani J.) December 14, 1973]
[Kuala Lumpur — Civil Suit No. 331 of 1970]

Insurance — Misrepresentation and concealment of facts — Contract uberrimae fidei — Proposal form signed by agent of defendant company — Whether agent of proposer — — Whether insurance company can disclaim liability.

The plaintiff claimed under a policy of insurance in respect of his car. The defendants pleaded that the policy was void as the proposal form contained untrue statements and answers. The proposal form had been filled in and signed by an agent of the defendant's company and it contained untrue answers to the question whether any previous insurance had been declined, refused or cancelled.

Held: (1) the untrue answers to the questions entitled the defendant company to avoid the contract;

(2) in the circumstances the agent of the company, when he signed the proposal form, did so as the agent of the plaintiff and therefore the plaintiff was bound.

Cases referred to:-

(1) *Goh Chooi Leong* v. *Public Life Assurance Co. Ltd.* [1964] M.L.J. 5.

(2) *Rozanes* v. *Bowen* (1928) 32 Ll. L.R. 98, 102.

(3) *Dawsons Ltd.* v. *Bounin and others* [1922] All E.R. Rep. 88.

(4) *Newsholme Brothers* v. *Road Transport and General Insurance Co. Ltd.* [1929] All E.R. Rep. 442.

(5) *Biggar* v. *Rock Life Assurance Co.* [1902] 1 K.B. 516.

CIVIL SUIT.

Balwant Singh Toor for the plaintiff.

Khoo Eng Chia for the defendant.

Hashim Yeop A. Sani J.: This is a suit in which the plaintiff claims from the defendant insurance company for cost of repairs, loss of use, demurrage and depreciation in respect of motor-car Registration No. MC 867 purporting to be covered by a comprehensive policy issued by the defendant insurance company. The defendants in their defence and counter-claim deny that they are liable and seek to avoid the policy on the grounds that the proposal made by the plaintiff and/or his agent contains certain untrue statements and answers, misrepresentations, concealment and suppression of truth.

The facts contained in the statement of agreed facts are as follows: —

"That by a Proposal and Declaration dated 6th November, 1968, the plaintiff requested the Defendants to issue to him a Policy of Insurance to cover, *inter alia*, loss of or damage to the plaintiff's said motor car No. MC 867.

That in pursuance of the said Proposal and Declaration and in consideration of the payment of the premium in the sum of $359.40 the Defendant issued to the Plaintiff a Policy of Insurance No. MC 368231 on the 25th November, 1968

That on the 9th December, 1968 between 7.30 p.m. and 9.50 p.m., the plaintiff parked his said motor car No. MC 867 in front of the State Cinema, Petaling Jaya and the said motor car was subsequently found to be stolen. A report of the theft was made at the Petaling Jaya Police Station, vide Report No. 7131/68.

That the said motor car was subsequently recovered by the Police and several accessories were missing.

That the Plaintiff's said motor car was previously insured with the National Insurance Co. Ltd., of Kuala Lumpur.

That the Plaintiff submitted his claim for the loss of accessories to the Defendants but the Defendants denied the claim on the ground that the said Policy of Insurance No. MC 368231 had been obtained by non-disclosure of material facts."

From the evidence adduced during the trial, the following additional facts came to light: —

(1) The proposal form (enclosure 7 in the Agreed Bundle) was not signed by the plaintiff but by one Lim Keat Chye who was and still is an agent of the defendant company.

(2) A negative answer was given to each of the questions specified in the proposal form which read as follows: —

"Has any Company or Underwriter in respect of the insurance on any motor vehicle
(a) Declined to insure you?
(b) Refused to renew Insurance?
(c) Cancelled your policy?"

(3) On the 27th of September, 1968, that is, less than two months before the said proposal form was filled up, the plaintiff had been given notice of the cancellation of the comprehensive insurance policy in respect of the said car No. MC 867 by the National Insurance Co. Ltd. (enclosure 16 in the Agreed Bundle); the reason for this cancellation was that the company had discovered that the previous insurance company of the plaintiff had treated his vehicle as a Total Loss (evidence of DW3 and enclosure 16 in the Agreed Bundle).

Such being the evidence, there is very little left to be considered in this case. The issues left to be considered can, in my opinion, be summarised as follows: —

(1) Whether the untrue answers to the questions referred to entitle the defendant company to avoid the contract; and